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FILE COPY

IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-804

GEORGE P. BAKER, RICHARD C. BOND, and JERVIS LANGDON, JR., TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, Debtor,

Petitioners,

v.

GOLD SEAL LIQUORS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIOARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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STATUTES CITED.

IN THE

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October Term 1973.

No. ———— .

GEORGE P. BAKER, RICHARD C. BOND, AND JERVIS LANGDON, JR., TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR,

Petitioners,

v.

GOLD SEAL LIQUORS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners George P. Baker, Richard C. Bond, and Jervis Langdon, Jr., Trustees of the Property of the Penn Central Transportation Company, Debtor in reorganization under Section 77 of the Bankruptcy Act (11 U.S.C. § 205), respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on August 23, 1973.

OPINIONS BELOW.

The findings of fact and opinion of the District Court for the Northern District of Illinois, entered February 18, 1972, are unreported and are printed in Appendix A hereto (A1-A3). The opinion of the panel of the Court of Appeals, entered on August 23, 1973, is not yet reported, and is printed in Appendix B (A4-A6).

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on August 23, 1973. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED.

Did the court below err in holding that a shipper was entitled to a net judgment and consequently to effect a setoff where a railroad in reorganization sued the shipper for pre-reorganization freight charges and the shipper counterclaimed for pre-reorganization loss and damage to shipments and where the Reorganization Court had denied setoffs to other creditors in the reorganization proceedings.

STATEMENT OF THE CASE.

The facts in the case are quite simple. On June 21, 1970, Penn Central Transportation Company filed a Petition for Reorganization under Section 77 of the Bankruptcy Act (11 U.S.C. 205). The Petition was filed in the District Court for the Eastern District of Pennsylvania (Reorganization Court), under the caption "In the Matter of Penn Central Transportation Company, Debtor, No. 70-347," and on the same day the Reorganization Court entered Order No. 1 approving the Petition. Paragraph 10 of Order No. 1 provided:

> "10. All persons, firms and corporations, holding collateral heretofore pledged by the Debtor as security for its notes or obligations or holding for the account of the Debtor deposit balances or credits be and each of them hereby are restrained and enjoined from selling, converting or otherwise disposing of such collateral, deposit balances or other credits, or any part thereof, or from off-setting the same, or any part thereof, against any obligation of the Debtor, until further order of this Court." (R. 32) [1]

On July 22, 1970, pursuant to Court Order No. 20, George P. Baker, Richard C. Bond, Jervis Langdon, Jr., and Willard Wirtz were appointed Trustees of the Debtor. The Trustees, *inter alia,* sought to collect the assets of the Debtor's estate of which one was a claim for freight charges which Gold Seal Liquors owed to the Debtor.

On December 22, 1970, the Trustees brought suit in the United States District Court for the Northern District of Illinois against Gold Seal Liquors to recover $8,256.61 in freight charges which had accrued during a period of approximately a year and a half prior to June 21, 1970 (R. 5-6).

1. The reference "R" is to the record in the Court of Appeals.

The cause of action arose under the laws of the United States regulating commerce, 49 U.S.C. §§ 3(2) and 6(7), and the District Court below had jurisdiction of the action under 28 U.S.C. § 1337. Gold Seal Liquors filed a counterclaim for $19,319.42 for loss and damage to various shipments accruing over a period of approximately two years prior to June 21, 1970 (R. 11).

The parties filed a Stipulation of Facts in which Gold Seal Liquors admitted its liability to the Trustees in the amount of $6,999.76, and the Trustees acknowledged their liability to Gold Seal Liquors in the amount of $18,016.77 (R. 15-16).

Previous to the institution of this action, the Reorganization Court had prohibited various bank creditors from offsetting against the Debtor (*Penn Central Transportation Co. v. National City Bank of Cleveland, et al.*, 315 F. Supp. 1281 (E.D. Pa. 1970)) (Bank Setoff Case), and had under advisement a petition of the Trustees for an order directing certain shippers to pay amounts due Debtor and prohibiting the shippers from offsetting.

After the institution of this matter, but prior to a decision by the Illinois District Court, the Bank Setoff Case was affirmed by the Third Circuit Court of Appeals. *In re: Penn Central Transportation Co.*, 453 F.2d 520 (3d Cir. 1971), *cert. den.* 408 U.S. 923 (1972). Further, during the same period, the Reorganization Court entered Order No. 571 granting the Trustees' petition prohibiting certain shippers, *inter alia*, from setting off freight loss and damage claims against amounts owed the Debtor for freight transportation services. *In the Matter of Penn Central Transportation Company, Debtor*, 339 F. Supp. 603 (1972), *aff'd* 477 F.2d 841 (3d Cir. 1973), *cert. den.* — U.S. — (No. 72-1698, 42 U.S. Law Week 3213); *aff'd sub nom. U.S. Steel Corp. v. Trustees*, — U.S. — (No. 73-94, 42 U.S. Law Week

3213) (Shippers' Setoff Case). The Illinois District Court, nevertheless, permitted a setoff which resulted in a net judgment in favor of Gold Seal Liquors against the Trustees in the amount of $11,017.01. The court held that, since an extra-judicial self-help setoff was not involved in the matter before it, setoff should be permitted.

An appeal was taken by the Trustees. The Circuit Court affirmed. Affirmance of the net judgment permitted Gold Seal Liquors to recover dollar for dollar on its pre-reorganization claim for loss and damage to the extent of the amount of the Trustees' admitted claim against Gold Seal, *viz.*, $6999.76.[2]

2. Although the Circuit Court stated that Gold Seal Liquors must now submit its claim on the judgment to the Reorganization Court (A6), it has, by affirming the net judgment, already permitted Gold Seal Liquors to recover $6,999.76.

REASONS FOR GRANTING THE WRIT.

In sustaining the right of appellee to set off a pre-bankruptcy debt against the Debtor, the court below failed to give adequate consideration to the reasons for denying setoffs as the Reorganization Court had done. In so doing, the decisions below are in conflict with the result reached in the Third Circuit in the Bank Setoff Case and the Shippers' Setoff Case, and will afford shipper-claimants in the Seventh Circuit a preference as compared with all other shipper-claimants located elsewhere.

The decisions below are also in direct conflict with *Trustees of the Property of Penn Central Transportation Company, Debtor v. Southeastern Michigan Shippers Co-Operative Association,* (Civ. Action No. 39090 U.S. Dist. Ct. E.D. Mich.) (Memorandum Opinion printed in Appendix C hereto A7-A21.)

The decisions below, which give effect to Gold Seal Liquors, Inc. setoff, are in direct variance with Reorganization Court Order No. 1 enjoining setoffs, and have the effect of interfering with the Reorganization Court's exclusive jurisdiction over the property of the Debtor's estate, and the equitable treatment of claims against the estate. By affirming the entry of a net judgment in this matter, the Court of Appeals for the Seventh Circuit has disposed of property of the estate, *i.e.* an admittedly valid chose in action for $6,999.76, by requiring it to be applied in partial payment of a pre-reorganization claim against the estate for loss or damage to freight. Section 77 of the Bankruptcy Act vests exclusive jurisdiction of such matters in the court supervising the reorganization of the debtor, here the U.S. District Court for the Eastern District of Pennsylvania. *In re New York, New Haven and Hartford Railroad Co.,* 457 F.2d 683 (2d Cir. 1972) *cert. den.* 409

U.S. 890 (1972); *Calloway v. Benton,* 336 U.S. 132, 147 (1949).

While the amount involved in this one proceeding is relatively small, there are several other suits pending in courts in the Seventh Circuit which would obviously be governed by this decision and, unless overturned, will result in claimants who happen to be sued in that Circuit receiving a clear preference over all other claimants with similar claims. This is grossly unfair, and should not be permitted to stand in light of the equitable considerations which caused the Reorganization Court to prohibit setoffs.

The Shipper Setoff Case (339 F. Supp. 603) arose out of a petition of the Trustees seeking an order directing numerous shippers to pay several million dollars in freight charges due the Debtor. These creditors had refused to pay the freight charges except to the extent a balance might be left after they had offset against the freight charges amounts which they claimed the Debtor owed them. The Reorganization Court first concluded that the Debtor had an obligation to collect freight charges due it, and the existence of claims against the Debtor did not change this. The Reorganization Court recognized that, but for reorganization, the shippers' claims against the Debtor could be litigated in actions brought by the Debtor to collect its freight charges. The question was whether the Court should exercise its discretion to enjoin setoffs.

The Reorganization Court reviewed the relevant factors and concluded that setoffs should not be permitted at this time. The relevant factors were as follows:

1) to permit the setoffs would be to discriminate against the vast majority of shippers who had paid their bankruptcy freight claims in full;

2) the cash need of the reorganization must be considered. It is more consistent with the overall purposes of Section 77 of the Bankruptcy Act that shipper claims be disposed of in the proofs of claim procedure rather than that current operating revenues of the Debtor should be jeopardized by setoffs; and

3) the Trustees, in the exercise of their business judgment, in an attempt to treat all parties fairly, requested that setoffs be restrained.

The Third Circuit Court of Appeals affirmed the summary jurisdiction of the Reorganization Court and reiterated that it was in that Court's sound discretion to determine "whether or not to permit setoff or counterclaim against the Debtor's charges." (477 F.2d at 845).

The Illinois District Court ignored the relevant factors set forth, and permitted Gold Seal Liquors the right of setoff by the entry of a net judgment in favor of Gold Seal. Petitioners agree that in the interest of judicial economy, the Illinois District Court could decide the counterclaim of Gold Seal Liquors. Indeed, considerations of practicality and judicial economy are what compelled the Trustees to liquidate their own claim in the District Court for the Northern District of Illinois. As is shown by the record herein, there was a dispute as to the actual amount owing to the Trustees on their chose in action for freight charges, and it was not until the factual dispute was resolved (here admittedly by way of stipulation) that the actual amount of the chose was liquidated. In a reorganization proceeding of this magnitude, to compel the Trustees to liquidate every chose in their possession in the Reorganization Court could bring the reorganization proceeding itself to a standstill.

The error committed by the Illinois District Court and affirmed by the court below was its refusal to enter separate judgments. By entering the net judgment it has effectively disposed of the Trustees' chose in action. The opinion of the court below gives lip service to the jurisdiction of the Reorganization Court by requiring that the resulting judgment "be submitted to the reorganization court with all other claims. . . ." (A6). However, by its affirmance of the net judgment, the court below has deprived the Reorganization Court of its jurisdiction over the valid chose in action which was the property of the Trustees.

Any recovery on the judgment entered on the counterclaim must be through the proof of claim procedure in the Reorganization Court. *Thompson v. Texas Mexican Ry. Co.*, 328 U.S. 134, 141 (1946). By failing to consider the reorganization proceedings of the Debtor, the courts below have discriminated in favor of Gold Seal Liquors to the detriment of other creditors of the Debtor. All other loss and damage claimants are relegated to the proof of claim procedure to recover any amounts owed to them. The judgment below has permitted Gold Seal Liquors to recover presently at least the amount of the setoff, $6,999.76, 100 cents on the dollar.

A case similar to the instant one and involving Petitioner is *Trustees of the Property of Penn Central Transportation Company v. Southeastern Michigan Shippers Co-Operative Association* (A7-A21). Here also both parties were indebted to one another, and one of the issues was whether setoff should be permitted. The court analyzed the setoff issue thoroughly and concluded that ". . . this court is without power to effect a setoff of any amounts recovered." (A21). Nevertheless, in the interest of judicial economy, the Michigan District Court has permitted the

counterclaim to be prosecuted and, if successful, has required that it be presented to the Reorganization Court for proof and allowance. This result correctly recognizes the exclusive jurisdiction of the Reorganization Court and highlights the error of the courts below here.

On the basis of the decision in the Shippers' Setoff Case, the courts below should have denied the right of setoff to Gold Seal Liquors. If the holding is permitted to stand, it will be controlling in the Seventh Circuit, and will have a detrimental effect upon the Debtor's estate. The Trustees will be faced with a Hobson's choice. They will have to forego the attempt to recover property of the estate in other forums, which is inconsistent with principles of judicial economy and efficiency. The alternative is to prosecute actions which will result in certain creditors' recovering all or part of their pre-bankruptcy claims, while other creditors are denied that right.

CONCLUSION.

We submit, therefore, that a Writ of Certiorari should be granted and that the decision below should be reversed.

Respectfully submitted,

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APPENDIX A.

DISTRICT COURT OPINION.

(Filed March 16, 1972.)

IN THE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 70 C 3205

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR. AND WILLARD WIRTZ, TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR,

Plaintiffs,

v.

GOLD SEAL LIQUORS, INC.,

Defendant.

MEMORANDUM OPINION AND ORDER.

This is an action by the trustees of the property of the Penn Central Transportation Company for unpaid freight charges for transportation performed by the Penn Central for and on behalf of defendant during the period August 22, 1968 to and including June 18, 1970. The defendant has filed a counterclaim alleging loss and damage to various shipments of merchandise handled by the Penn Central for defendant's account, and alleging that the freight charges as to these lost and damaged shipments have been paid.

The parties have filed a stipulation of facts in which they agree that $6,999.76 in transportation charges is due and owing from defendant to plaintiffs and that $18,016.77

is due and owing from plaintiffs to defendant for loss and damage to certain shipments.

The case is now before the Court on plaintiffs' motion for summary judgment in favor of each party for the stipulated amounts. Plaintiffs contend, however, that the law pertaining to the reorganization of a railroad does not permit a set-off of one judgment against the other, resulting in a net judgment for defendant. The question presented, then, is whether this Court should allow the set-off of one judgment against the other.

On June 21, 1970, the United States District Court for the Eastern District of Pennsylvania entered an order approving the petition of the Penn Central Transportation Company for reorganization under Section 77 of the Bankruptcy Act (11 U.S.C. § 205, et seq.). Section 68(a) of the Bankruptcy Act (11 U.S.C. § 108(a)) provides that:

> In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

This case is collateral to the reorganization proceedings and was brought by the trustees in exercise of their power to gather assets and keep the business going. In such a suit, Section 68(a) applies only by way of analogy, based on the equities of the situation. *Lowden v. N. W. National Bank,* 298 U.S. 160 (1936).

The plaintiffs contend that Section 68(a), although unequivocal on its face, is generally not applied in reorganization cases as it is in straight bankruptcy proceedings since the purpose of reorganization is to "save a sick business, not to bury it and divide up its belongings." *Susquehana Chemical Corp. v. Producers Bank & Trust Co.,* 174 F.2d 783, 787 (3rd Cir. 1949).

The plaintiffs have also pointed out that the reorganization court in which the Penn Central filed its petition for reorganization has consistently refused to allow set-offs. The set-offs involved there, however, were extra-judicial attempts at self-help which that court felt would hamper the administration of the reorganization.

The plaintiffs have cited no authority to support the entry of judgments on both the claim and counter-claim while at the same time denying a set-off of one against the other. Nor would that be the equitable course of action to follow in the instant case. The defendant is being precluded from satisfying *any* judgment it receives in the instant case as a result of the pending reorganization proceedings. It should not suffer further damage by being precluded from a set-off of its judgment against that of the plaintiffs.

For the reasons stated herein, the plaintiffs' motion for summary judgment is granted. The plaintiffs are indebted to the defendant in the amount of $18,016.77 and the defendant is indebted to the plaintiffs in the amount of $6,999.76. Therefore, a net judgment is hereby entered in favor of defendant and against plaintiffs in the amount of $11,017.01.

ENTER:

ALEXANDER J. NAPOLI,
United States District Judge.

DATED: March 16th, 1972

APPENDIX B.

COURT OF APPEALS OPINION.

(Filed August 23, 1973.)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1972—APRIL SESSION, 1973

No. 72-1386

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., AND WILLARD WIRTZ, TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR,
Plaintiffs-Appellants,

v.

GOLD SEAL LIQUORS, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
ALEXANDER, J.
NAPOLI, *D.J.*
No. 70 C 3205

ARGUED APRIL 20, 1973—DECIDED AUGUST 23, 1973

Before SWYGERT, *Chief Judge,* HASTINGS and MURRAH,* *Circuit Judges.*

MURRAH, *Circuit Judge.* The trustees of the Penn Central Transportation Company in a Section 77 reorganization proceeding in the District Court for the Eastern District of Pennsylvania brought this plenary suit in the Northern District of Illinois against Gold Seal Liquors, Inc. to recover $6,999.76 for accrued freight charges. Gold Seal Liquors counterclaimed for $18,016.77

* Alfred M. Murrah, of the Tenth Circuit, sitting by designation.

for cargo loss and damages. The Illinois court allowed a setoff and rendered judgment against the trustees for the balance in the sum of $11,017.01. The respective accounts are not disputed. The sole question is the propriety of the setoff.

It seems to be agreed that the setoff provisions of Section 68 of the Bankruptcy Act do not necessarily obtain in a reorganization proceeding of this kind. That is, *see Susquehanna Chemical Corp. v. Producers Bank & Tr. Co.*, 174 F.2d 783 (3d Cir. 1949), and *Lowden v. N. W. National Bank*, 298 U.S. 160 (1936). Nor do the trustees contend that the Illinois court was not empowered to grant the setoff. The contention is that "considerations of judicial comity should have persuaded" the Illinois court to honor Order No. 571 of the bankruptcy court enjoining all persons, firms and corporations holding credits for the account of the debtor from offsetting them against any obligation of the debtor.

Giving force and effect to Order No. 571, the bankruptcy court has held in a summary contempt proceeding that Section 77(a) conferred upon it "exclusive jurisdiction of the debtor and its property wherever located"; that choses in action are property of the debtor and in the actual or constructive possession of the debtor; and that it would prejudice the public interest in the continuation of railroad service to allow setoffs to deprive the debtor of sorely needed bank cash. *See Penn Cent. Tr. Co. v. National City Bank of Cleveland, Ohio,* 315 F. Supp. 1281 (E.D. Pa. 1970). The banks in that case were accordingly summarily ordered to restore the bank balances which they had set off against debts owed them by the railroad. 315 F. Supp. at 1285. This order, however, did not undertake to formally adjudicate the rights of the parties, it merely restrained the banks from exercising the remedy of self-help. *See* 315 F. Supp. at 1284.

In a plenary suit indistinguishably similar to ours, the Indiana court declined to adjudicate the counterclaim or to allow a setoff on the grounds that, inasmuch as Order No. 571 expressly enjoined setoffs, counterclaims must be filed and adjudicated by the bankruptcy court along with the claims of other creditors. *See Penn Central Transp. Co. v. March Warehouse Corp.*, 356 F. Supp. 567 (S.D. Ind. 1972).

We cannot agree that "judicial comity" dictates forbearance of the exercise of the jurisdiction of the court in cases of this kind. The trustees having invoked the jurisdiction of the Illinois court for the adjudication of the railroad's claim, there is nothing in the principles of "judicial comity" to require the Illinois court to withhold the full exercise of its jurisdiction.

After all, plenary actions by trustees in a reorganization proceeding are nothing more than ordinary lawsuits. *See, e.g.*, 5 Moore's Federal Practice ¶ 38.30(4). The power to adjudicate the subject matter is unquestioned and unquestionable. The Federal Rules of Civil Procedure undoubtedly apply (*see* 7 Moore's Federal Practice ¶ 81.04 (1)), and a counterclaim is permissible, even compulsory (*see* Fed. R. Civ. P. 13(a)-(c), and 3 Moore's Federal Practice ¶¶ 13.12(1) and 13.13). Both the claim and the counterclaim are upon stated accounts—equitable principles do not serve to shape or fashion the relative rights and remedies of the parties.

The adjudication of the claims in the Illinois court is a matter of law. The satisfaction of the resulting judgment is subject to the equitable principles generally applicable in a court of bankruptcy. The judgment of the Illinois court must now be submitted to the reorganization court with all other claims, to be satisfied in accordance with the appropriate orders of that court.

The judgment is affirmed.

APPENDIX C.

CONFLICTING OPINION.

(Filed September 28, 1973.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION.

Civil Action
No. 39090.

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., AND WILLARD WIRTZ, TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, A PENNSYLVANIA CORPORATION, DEBTOR,

Plaintiffs,

v.

SOUTHEASTERN MICHIGAN SHIPPERS CO-OPERATIVE ASSOCIATION, A/K/A SEMCO, INC., A MICHIGAN CORPORATION,

Defendant.

MEMORANDUM OPINION.

Plaintiffs (trustees of the property of Penn Central Transportation Company) sue for freight charges totaling $22,773.19 incurred by defendant (SEMCO, Inc.) between October 10, 1969, and November 11, 1969. Defendant pleads a prior accord and satisfaction and, in the alternative, counterclaims against plaintiffs in the amount of $20,179.80 for damages to cargo sustained on February 21, 1969, and

March 3, 1969. It is these damage claims which defendant contends were previously set off against the freight charges now sought by plaintiffs, the difference of $1,852.07 having been tendered and accepted on November 17, 1969.

Accord and Satisfaction.

It appears that SEMCO did try to arrange a mutual cancellation of accounts—the railroad's carriage charges against the shipper's claims for damages to cargo. Based on the facts elicited on these cross-motions for summary judgment, however, it is unclear whether these efforts came to a legally effective fruition.[1] There are genuine and material issues of fact yet to be decided on this question, and if there were no other factors involved, this case would be inappropriate for summary disposition. This result is complicated and somewhat altered by two additional facts: (1) the freight charges involved here are covered by the Interstate Commerce Act[2] and (2) since these claims accrued

1. "We recognize the Michigan rule that to constitute an accord and satisfaction, the tender of payment as being in full should be made in unequivocal terms so that the creditor in accepting the payment will do so understandingly. Durkin v. Everhot Heater Co., 266 Mich. 508, 513, 254 N.W. 187 [1934]." Allstate Ins. Co. v. Springer, 269 F.2d 805, 809 (6th Cir. 1959), cert. denied, 361 U.S. 932 (1960). See also Lafferty v. Cole, 339 Mich. 223, 228 (1954) (creditor must be "fully informed of the condition accompanying acceptance"). This is merely a corollary to the general principle that an accord requires a meeting of the minds of the parties in an agreement to substitute one type of performance for another. See Stadler v. Ciprian, 265 Mich. 252, 262 (1933).

Here the evidence indicates that defendant's offer of settlement was ambiguous and equivocal. In a letter dated November 19, 1969, defendant's executive manager indicated that the off-setting of accounts and payment of the difference did not mean that SEMCO was declining payment of the freight charges, but that they would be paid as soon as the damage claims were approved by the railroad. Without further proof of the parties' intentions, this is insufficient to prove the existence (or nonexistence) of the claimed accord

2. 49 U.S.C. § 1 *et seq.*

the railroad has entered into reorganization under the Bankruptcy Act.[3]

First, plaintiffs argue that whether or not the facts make out an accord and satisfaction is in the end irrelevant, for Section 6(7) of the Interstate Commerce Act[4] absolutely prohibits and nullifies such arrangements. That section, prompted by a congressional purpose to eliminate secret preferences and kickbacks to shippers,[5] mandates strict adherence to published tariffs.[6] In applying this provision, the Supreme Court has held that a carrier may be compensated for its services only by payment in cash[7]

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3. Reorganization of the Penn Central Transportation Company under 11 U.S.C. § 205 was initiated by an order of the District Court for the Eastern District of Pennsylvania on June 21, 1970 [hereinafter cited as Order No. 1], approving the railroad's petition and containing various provisions concerning its continued operation. Relevant materials may be found in the Corporate Reorganization Reporter (Penn Central).

4. "No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs." 49 U.S.C. § 6(7).

5. See, e.g., Atchison, T. & S.F. Ry. Co. v. Bouziden, 307 F.2d 230, 234 (10th Cir. 1962); Baker v. Prolerized Chicago Corp., 335 F. Supp. 183, 185 (N.D. Ill. 1971). See also 49 U.S.C. § 3(1) (prohibiting preferences or prejudices).

6. "The lawful rate is that which the carrier *must* exact and that which the shipper *must* pay." Kansas City So. Ry. Co. v. Carl, 227 U.S. 639, 653 (1913) (emphasis added).

7. Louisville & N.R. Co. v. Mottley, 219 U.S. 467, 477 (1911).

or by check [8] or by way of judicial set-off against judgments due the shipper.[9] Any form of payment containing the potential for departure from the exact letter of the tariffs (such as the supplying of goods and services in exchange for carriage) [10] is prohibited.

Defendant argues that the exception for judicial set-offs, enunciated by the Court in *Chicago & N.W. Ry. Co. v. Lindell*, 281 U.S. 14 (1930), should be extended to a prior set-off of accounts (rather than judgments) concluded informally between the parties. Defendant cites no cases supporting this position. *Burlington Northern Inc. v. United States*, 462 F.2d 526 (Ct. Cl. 1972), falls squarely within the *Lindell* exception. "According to plaintiff's reading, there can be no deduction of a damage claim against transportation charges except by adjudication of a court. But that is exactly the situation we have here." 462 F.2d at 529. The same is true of *Yale Express System, Inc. v. Nogg*, 362 F.2d 111 (2nd Cir. 1966), and *Southern Pacific Co. v. Miller Abattoir Co.*, 454 F.2d 357 (3rd Cir. 1972).

On the other hand, at least two courts have squarely faced the issue of whether non-judicial set-offs are permissible under the Interstate Commerce Act, and have determined that they are not.

> "Another group of shippers contend that, prior to bankruptcy, there was an agreed settlement of mutual accounts between the Debtor and the shipper, with the result that the Debtor either owes money to the shippers, or is owed much less than is now being claimed by the Trustees. . . . To the extent that the Debtor's claims against these companies were based on freight

8. Fullerton Lumber Co. v. Chicago, M., St. P. & P.R. Co., 282 U.S. 520, 522 (1931).

9. Chicago & N.W. Ry. Co. v. Lindell, 281 U.S. 14, 17 (1930).

10. Chicago, I. & L. Ry. Co. v. United States, 219 U.S. 486, 496-97 (1911).

charges, it is clear under the principles set forth previously that they were incapable of being discharged either by unilateral set-offs or by mutual agreement." *In re Penn Central Transportation Co.*, 339 F. Supp. 603, 607 (E.D. Pa. 1972).

This conclusion was specifically approved by the Third Circuit:

"[One of the appellants] contends that under applicable Pennsylvania law, it extinguished its debt to the railroad by the nonjudicial set-off of a debt owed to it by the carrier . . . . Even assuming the validity of appellant's contention under Pennsylvania law, such a set-off would have been in express contravention of the Interstate Commerce Act. Indeed, the Act was so designed to prevent the kind of secret kickbacks which this type of practice could lead to." *In re Penn Central Transportation Co.*, 477 F.2d 841, 845 (3rd Cir. 1973).

The reason for distinguishing between judicial and nonjudicial set-offs is obvious. In the former case, there is no adjustment until the exact value of each party's claim has been authoritatively determined; in the latter instance, there is no guarantee that the debt off-set against the freight charges is worth the amount allowed. When the set-off is judicially supervised, there is little opportunity for collusion; when it is privately arranged, there is no such assurance. In short, it is the policy of the Act to permit payment of freight charges only in a manner offering little or no opportunity for evasion of the tariff. Judicial set-offs satisfy this requirement while private arrangements do not.

As a result, the accord and satisfaction pleaded by defendant, even if convincingly established, is inadequate to resist the trustees' cause of action. Because defendant

interposes no other defenses,[11] plaintiffs are entitled to summary judgment for the undisputed portion of their claim—$22,039.89—minus the $1,852.07 previously paid. There is a genuine dispute of fact as to waybills 223588 and 228460, totaling $733.32, which must be resolved at trial.

The Counterclaim.

The railroad's reorganization raises a second question, namely whether the defendant may nevertheless recover in this court on its counterclaim. Initially, it should be noted that its claim is contested, both as to liability and damages. There has been presented no evidence from which this court can decide the issues raised, and therefore the defendant's cross-motion for summary judgment must be denied in any event.

Under *Lindell*, this court would ordinarily be authorized to proceed to judgment on the counterclaim and off-set any recovery thereunder against plaintiff's recovery. The problem is to determine what effect the intervening reorganization may have on the defendant's cause of action. Two issues must be considered: (1) whether the action may be maintained in this court and (2) if so, whether this court is empowered to set off any recovery against that of plaintiff (*i.e.*, in effect to execute upon the judgment).

1. *Set-off*. Taking the second point first, this court is immediately confronted with 11 U.S.C. § 205(a), which gives the bankruptcy court in a railroad reorganization "exclusive jurisdiction of the debtor and its property wherever located . . . ." "Property" in the bankruptcy setting includes a cause of action such as that asserted by

11. "The Consignee alleged the Railroad's breach both as a defense and as a counterclaim. The alleged breach, however, does not constitute a defense to the Railroad's claim for freight charges, but constitutes an independent claim. . . ." Southern Pacific Co. v. Miller Abattoir Co., 454 F.2d 357, 362 (3rd Cir. 1972).

the trustees in this case [12] and any recovery granted thereunder.[13] "Exclusive jurisdiction" is generally given a literal interpretation.[14] It follows that this court can exercise jurisdiction over the bankrupt's property, including a judgment or cause of action, only to the extent permitted by the bankruptcy court.[15]

That court, by its order of June 21, 1970, has authorized the trustees to institute and prosecute in any court suits for the recovery or protection of its property or rights,[16] and to settle or defend claims against the debtor,[17] including, in their discretion, "claims for loss, damage or delay to freight and baggage . . . ."[18]

> "[B]ut no payment shall, without further order of this Court, be made by the Debtor in respect of any such actions, proceedings or suits on claims accruing prior to the date of this order except such claims as may be permitted to be paid by this order or by other general orders hereafter entered herein, and such as constitute preferred claims under the Acts of Congress relating to bankruptcy; and no action taken by the Debtor in defense or settlement of such claims, actions, proceedings, or suits shall have the effect of establishing any claim upon, or right in, the property or funds in the possession of the Debtor that otherwise would not exist."[19]

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12. 11 U.S.C. § 110(a)(6).

13. Meyer v. Fleming, 327 U.S. 161, 165 (1946).

14. See, e.g., In re New York, N.H. & H.R. Co., 457 F.2d 683, 689 (2nd Cir. 1972); In re Imperial "400" National, Inc., 429 F.2d 671, 676-77 (3rd Cir. 1970).

15. Cf. Warren v. Palmer, 310 U.S. 132 (1940); Ex parte Baldwin, 291 U.S. 610 (1934).

16. Order No. 1, *supra*, note 3, ¶ 5.

17. *Id.*

18. *Id.*, ¶ 3B.

19. *Id.*, ¶ 5.

Thus, it appears that this court is empowered to adjudicate the plaintiffs' claim, but that it has no authority to dispose of any recovery upon that claim, whether by way of set-off or otherwise. Even if this court may also hear defendant's counterclaim (a matter yet to be decided), it may not satisfy that judgment out of the debtor's property, including its judgment in this suit. Once "the claim is reduced to judgment [it] may then be presented to the bankruptcy court for proof and allowance." *Thompson v. Texas Mexican Ry. Co.*, 328 U.S. 134, 141 (1946).

2. *Authority to Entertain Counterclaim.* The bankruptcy court has exclusive jurisdiction over not only the debtor's property, but over "any rights that may be asserted against it. These rights may be altered in any way thought necessary to achieve sound financial and operating conditions for the reorganized company, subject to the requirements of the Act." *Callaway v. Benton*, 336 U.S. 132, 147 (1949). In a railroad reorganization the class of claims included within the scope of this power is very great. "The term 'claims' includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character." 11 U.S.C. § 205(b).[20]

In essence, the bankruptcy court may modify in any way it feels necessary any right asserted against the debtor which might adversely affect the reorganization plan. The fact that it is raised in the form of a counterclaim to a suit instituted by the trustees is irrelevant. The counterclaim is not a defense to the original claim, but an independent claim which must be approached on its own merits.[21]

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20. Also cf. 11 U.S.C. § 205(b): "The term 'creditors' shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act. . . ."

21. See note 11, *supra*.

11 U.S.C. § 108, authorizing certain set-offs and counterclaims in ordinary bankruptcy, is not binding in Chapter X corporate reorganization cases, where it could defeat the very purpose of the reorganization by depriving the debtor corporation of much-needed working capital, thus endangering its ability to continue in operation.[22] In railroad reorganizations, where the public interest in survival of the enterprise is even more compelling, the reorganization court may not only enjoin set-offs,[23] but may go further and

> ". . . enjoin or stay the commencement or continuation of suits against the debtor until after final decree; and may, upon notice and for cause shown, enjoin or stay the commencement or continuance of any judicial proceeding to enforce any lien upon the estate until after final decree: *Provided,* That suits or claims for damage caused by the operation of trains, busses, or other means of transportation may be filed and prosecuted to judgment in any court of competent jurisdiction and any order staying the prosecution of any such cause of action or appeal shall be vacated." 11 U.S.C. § 205(j).

The Penn Central reorganization court has enjoined certain set-offs,[24] which the parties seem to have assumed

22. Lowden v. Northwestern National Bank, 298 U.S. 160, 163-66 (1936); In re Yale Express System, 362 F.2d 111, 116-17 (2nd Cir. 1966); Susquehanna Chemical Corp. v. Producers Bank & Trust Co., 174 F.2d 783, 787 (3rd Cir. 1949).

23. Penn Central Transportation Co. v. National City Bank of Cleveland, 315 F. Supp. 1281, 1283-84 (E.D. Pa. 1970), affirmed sub nom In re Penn Central Transporation Co., 453 F.2d 520, 522-23 (3rd Cir. 1972).

24. "All persons, firms and corporations, holding collateral heretofore pledged by the Debtor as security for its notes or obligations or holding for the account of the Debtor deposit balances or credits be and each of them hereby are restrained and enjoined

are applicable in this case, though the assumption is a rather questionable one. This point is mooted, however, by the court's broader command that:

> "All persons and all firms and corporations, whatsoever and wheresoever situated, located or domiciled, hereby are restrained and enjoined from interfering with, seizing, converting, appropriating, attaching, garnisheeing, levying upon, or enforcing liens upon, or in any manner whatsoever disturbing any portion or the assets, goods, money, deposit balances, credits, choses in action, interests, railroads, properties or premises belonging to, or in the possession of the Debtor as owner, lessee or otherwise, or from taking possession of or from entering upon, or in any way interfering with the same, or any part thereof, or from interfering in any manner with the operation of said railroads, properties or premises or the carrying on of its business by the Debtor under the order of this Court and from commencing or continuing any proceeding against the Debtor, whether for obtaining or for the enforcement of any judgment or decree or for any other purpose, provided that suits or claims for damages caused by the operation of trains, buses, or other means of transportation may be filed and prosecuted to judgment in any Court of competent jurisdiction . . . ."[25]

Because of the bankruptcy court's exclusive jurisdiction over such matters, that mandate is binding upon this court.

24. (Cont'd.)

from selling, converting or otherwise disposing of such collateral, deposit balances or other credits, or any part thereof, or from offsetting the same, or any thereof, [sic] against any obligation of the Debtor, until further order of this Court." Order No. 1, *supra* note 3, ¶ 10 (footnote omitted).

25. *Id.*, ¶ 9.

Thus the ultimate issue is whether the proviso in subsection (j) of the statute, incorporated verbatim in the court's order, applies to defendant's counterclaim. If it constitutes a claim "for damages caused by the operation of trains, busses, or other means of transportation," it is cognizable in this court. If not, it falls within the scope of the order and its prosecution here is effectively enjoined.

There is relatively little case law interpreting the proviso, and what there is is either contradictory or inconclusive. Certainly "[t]he language of the proviso in § 77(j) is sufficiently broad to include all tort or contract claims whatsoever that arise from the operation of the trains or busses of the debtor." 5 *Collier on Bankruptcy* ¶ 77.12 at 516 (14th ed. 1970). Such a literal reading of the statute would clearly place SEMCO's counterclaim within the proviso. On their facts, several cases from the New York courts appear to support this result. See *Erie R. Co. v. William J. Pfeil, Inc.*, 11 N.Y.S.2d 155, 256 App. Div. 465 (1939) (counterclaim for damage to shipment of beans caused by salt in car held to be within proviso; counterclaim for breach of contract to construct a side track was outside proviso); *Yerckes-Eichenbaum, Inc. v. McCarthy*, 35 N.Y.S.2d 527, 264 App. Div. 403 (1942) (action for breach of contract of carriage within proviso); *Liquid Carbonic Corporation v. Erie R. Co.*, 14 N.Y.S.2d 168, 171 Misc. 969 (1939) (damage to cargo caused by failure to provide proper unloading facilities held to be within proviso). On the other hand, an opinion of the Seventh Circuit Court of Appeals of about the same vintage discusses the proviso at length, and concludes that Congress intended only to exempt personal injury claims. *In re Chicago & E. I. Ry. Co.*, 121 F.2d 785, 789 (7th Cir. 1941), *cert. denied sub nom. Chicago & E. I. Ry. Co. v. Gourley*, 314 U.S. 653 (1941). Two other federal courts have effectively avoided the issue in personal injury cases, which are uniformly recognized as

falling within the proviso. *Munnelly v. Farrell*, 317 F. Supp. 329 (S.D.N.Y. 1970); *Rodabaugh v. Denny*, 24 F. Supp. 1011 (S.D.N.Y. 1938). Finally, one other federal court seemed in passing to endorse the personal injury restriction, but went on to hold that a penalty for violation of the Safety Appliance Act is outside the proviso without ever defining its exact scope. *United States v. Dorigan*, 236 F. Supp. 106, 108 (E.D.N.Y. 1964).

It seems a sound rule of construction to adopt the simplest, most obvious interpretation of statutory language, unless there are clearly shown, persuasive reasons for doing otherwise.[26] A court may reasonably adopt a narrower or broader construction when to do so would better effectuate legislative intent.[27] This imperfectly expressed intent may have been actual (often discovered in legislative history) or it may be implied (a euphemism for the judicial rounding off of a law's sharp corners). But however the burden of justifying a non-literal interpretation is formulated, it has not been satisfied here. There is no legislative history to indicate that Congress intended something other than what it appeared to say. There is no evidence of overriding policies or dysfunctional effects which would permit this court to conclude that Congress should or would have in-

26. "True, courts in the interpretation of a statute have some scope for adopting a restricted rather than a liberal or a usual meaning of its words where acceptance of that meaning would lead to absurd results, . . . or would thwart the obvious purporse of the statute. . . . But courts are not free to reject that meaning where no such consequences follow and where, as here, it appears to be consonant with the purposes of the Act as declared by Congress and plainly disclosed by its structure." Helvring v. Hammel, 311 U.S. 504, 510-11 (1941).

27. "It is well established, however, that a meaning not conveyed by the literal language may be given in order to carry out the legislative intention, if the words used will bear such meaning." United States v. Breenan, 214 F.2d 268, 270 (D.C. Cir. 1954), cert. denied, 348 U.S. 830 (1954).

tended something else, and to impute to it such intent *nunc pro tunc.*

Indeed, to the extent there are such factors, they weigh in favor of a literal reading of the proviso. First, it would not alter the bankruptcy court's power to rule on the allowance of such claims, thus producing no interference with any part of the reorgnization plan (which is the primary *raison d'être* for this section of the statute).

Second, the policy behind the subsection (j) proviso itself appears to be similar to that behind 28 U.S.C. § 959, permitting suit without leave of the bankruptcy court respecting acts or transactions of the trustees in "carrying on" the debtor's business. Referring to a predecessor of that section, the Supreme Court observed that:

> "This act abrogated the rule that a receiver could not be sued without leave of the court appointing him, and gave the citizen the unconditional right to bring his action in the local courts, and to have the justice and amount of his demand determined by the verdict of a jury. He ceased to be compelled to litigate at a distance, or in any other forum, or according to any other course of justice, than he would be entitled to if the property or business were not being administered by the Federal court.
>
> "The object of the section is manifest, and it is equally plain that that object would be open to be defeated if the receiver could remove the case at his volition. The intention to permit this to be done cannot reasonably be imputed to Congress, and, moreover, such a right would be inconsistent with the general policy of the act." *Gableman v. Peoria, D. & E. Ry. Co.,* 179 U.S. 335, 338 (1900).

Such a rationale suggests no basis for distinguishing between claims for property damage and those for personal

injury. Judge Patterson, in the *Rodabaugh* case, reached a similar conclusion in an analogous situation:

> "In a very broad sense every action against a railroad company wherein money damages are demanded is an action for 'damages caused by the operation of trains, busses, or other means of transportation.' The primary business of a railroad company is to operate trains, and all its activities are incidental to the operation of trains. The words of the proviso are not to be construed so broadly; nor on the other hand, should they be construed so narrowly as to defeat the purpose of Congress in enacting the proviso. Congress doubtless had in mind the fact that the district court in charge of reorganization might be a long distance from the court in which an action for damages might be brought, and that the obtaining of consent of the court in charge of reorganization might be a hardship on a claimant. This is a factor in favor of a liberal interpretation of the proviso. There is no apparent reason for a distinction between the case of a plaintiff who is struck by a moving train and the case of a plaintiff who was injured by the collapse of a scaffold while working as an employee of the railroad. I am of opinion [sic] that the present case is one 'for damages caused by the operation of trains, busses or other means of transportation' and that the prosecution of the action in the usual manner has not been restrained by the reorganization court." 24 F. Supp. at 1012.

Finally, it must be remembered that defendant presses its claim in this court only in response to one initiated here by the trustees themselves. To hear the plaintiffs' case but not the defendant's, when both might easily be disposed of in one action, seems not only an uneconomic allocation of judicial resources but also an unduly harsh and useless

result. As a general rule, statutes should be construed so as to avoid the imposition of such arbitrary and meaningless hardships.[28]

For these reasons, summary judgment will enter in favor of plaintiffs for the undisputed portion of their claim. The remainder of their claim, as well as defendant's counterclaim, may be prosecuted in this court. However, this court is without power to effect a set-off of any amounts recovered pursuant thereto.

An appropriate order may be submitted.

JOHN FEIKENS,
United States District Judge.

DATED: DETROIT, MICHIGAN
SEPTEMBER 28, 1973.

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28. "The courts draw back from the construction of an ambiguous statute that would lead to unjust results, just as nature draws back from the consistency of one of its laws that would encase in ice fish at the bottom of a river." Voris v. Gulf-Tide Stevedores, 211 F.2d 549, 552-53 (5th Cir. 1954), cert. denied, 348 U.S. 823 (1954).